

FILE

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant(s) : Loewenstein  
Serial No. : 10/015,314  
Filed : 12/11/01  
Title : POKER GAME  
Examiner : Rada  
Art Unit : 3714

APPEAL BRIEF

I. Real Party in Interest

David A. Loewenstein

II. Related Appeals and Interferences

None.

III. Status of Claims

All but claims 26 and 27 claims were rejected on the grounds on obviousness based in whole or in part on the combination of the Marks (U.S. Patent No. 5,882,260) and Wood (U.S. Patent No. 6,471,587), as the table below shows:

<u>Claims</u>	<u>Basis of Rejection</u>
1-6, 8-12, 14, 17-19 and 23	Combination of Marks and Wood
7 and 13	Combination of Marks, Wood and Garrod
16	Combination of Marks, Wood and Wächtler

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

1

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Claims 26 and 27 were newly added just before the last office action. They were not rejected on the basis of any prior art, and presumably the Examiner concedes they are valid in view of the prior art. Claim 26 was rejected under to 35 U.S.C. § 112, ¶ 1 and ¶ 2 because the Examiner incorrectly thought there was no disclosure for exchanging cards from anything other than opposite sides of the figure, and because he asserted, without any explanation, the claim allegedly was indefinite.

Claim 27 was rejected because the term "the swaps" had "insufficient antecedent basis." Claim 27 has been amended to make that rejection moot.

#### IV. Status of Amendments

Claim 27 was amended to change the word "swaps" to "exchanges," a term that has an antecedent. No other amendments after the final rejection have been made.

#### V. Summary of Invention

The invention relates to a novel, seemingly easy, but subtly complex multihand poker game.

The video poker games of the Group 1 claims (see below), for example, are a unique combination of card exchanges and cards arranged in a four-sided diamond pattern with corner cards that are common to adjacent hands (the value of which can be unknown), that as explained in more detail below, require a player to make complex multi-variant decisions on how to exchange cards from one hand to another. This card arrangement coupled with the card exchanges creates complicated playing strategies that

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

have never been disclosed or suggested in any prior art reference. The novel aspects can further be appreciated because the game can have over 12 cards dealt face-up (about 1 of 4 cards in the deck), giving the player the impression that the game is easy to play, and easy win. This is not so; the swapping feature together with the shared corner cards inject very difficult strategic tradeoffs not disclosed or suggested in any prior art reference.

Other claims cover variations of these themes. There are claims for figures other than diamonds and claims to pair of hands. These games share similar features; that is, they have common end cards (for games that have pairs of hands) and common corner card (for other figures); all games include card exchanges.

Multihand video poker games have become extremely popular in casinos. To be economically attractive to casinos they require rapid play. The inventive games at issue here solve the problem exhibited by the prior art Marks patent (a failed multihand game), that was so slow and cumbersome that it was unusable.

Applicant submitted uncontradicted testimony of both the novelty of the claimed inventions and the failure of the prior art in the Declaration of Mr. Tony Celona, a recognized expert in the field, with 24 years of gaming experience in Atlantic City, Connecticut and New York, who had been responsible for 7,000 slot and video poker machines at Foxwoods casino (the largest in the world), and is a gaming patentee in his own right. Mr. Celona has personal knowledge of Marks' game and its significant shortcomings, and opined that Applicant's invention would not have been obvious, and was entirely distinct from Marks. The Examiner improperly ignored that probative evidence.

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

3

VI. Issues

- A. Was it proper for the Examiner to ignore Mr. Celona's Declaration?
- B. Did the Examiner err when he failed to consider the prior art as a whole and instead focused on a single figure in the 150 column Marks patent?
- C. Did the Examiner follow the Federal Circuit's requirement and engage in a "*rigorous application of the requirement for a showing of the teaching or motivation to combine*" when he said a person of ordinary skill in the art would have combined Marks' cumbersome one-at-a-time game and Wood, even though there is no teaching or suggestion in any prior art to combine?
- D. Even if Marks and Wood were combined, would the resulting combination have all elements of the claimed inventions?
- E. If making the section 112 rejections, did the Examiner err when he overlooked repeated statements in the specification that cards could be exchanged from one hand to another, without mentioning any limitation to exchanging cards from the opposite side of a figure, and did he overlook Figure 7 that specifically shows exchanging cards from non-opposite hands?
- F. Did the Examiner err in stating for the first time after 3 ½ years of prosecution, and for the first on a Final Rejection, that a flow chart was mandatory, when 37 C.F.R. § 1.81 states that drawings are only need "where necessary for the

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

understanding of the subject matter sought to be patented," and the subject matter is plainly understandable (indeed, according to the Examiner obvious).

VII. Grouping of the Claims

The claims can be grouped as follows:

Group 1

Independent method claims 1, 23, 26 and 27 (four-sided diamond pattern, three interior cards and two common corner cards):

- Dependent claims 2- 9.

Group 2

Independent apparatus claim 10:

- Dependent claims 11 - 16.

Group 3

Independent method claim 17 (pair of hands, five cards, with common end cards):

- Dependent claims 18 - 19.

VIII. ARGUMENT

A. The Examiner's Rejections

The primary issue on appeal is Examiner's improper prior art rejections that were based solely on obviousness. There was no anticipatory prior art cited.

All prior art rejections included the combination of the Marks and Wood patents. Dependent claims were rejected based on the combination of Marks and Wood with the addition of Garrod and Wächtler, as the chart above shows.

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

The alleged motivation to combine Marks and Wood the Examiner identified was:

"it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify Marks to include exchanging cards from one hand to another as taught by Wood to provide game players a chance to modify their poker had [sic] to increase their chances for a better reward." (page 5).

In an effort to counter Applicant's showing that there was no motivation to combine these two references, the Examiner stated that (pages 8 - 9):

"the suggestion to combine can be found in the reference to Wood et al (US 6,471,587). Marks et al (US 5,882,260) disclosed all the claimed limitations except for exchanging cards. Wood et al was used to teach the feature of exchanging cards."

This "motivation" is simply assuming the conclusion. The motivation supposedly exists, according to the Examiner, because individual claim elements allegedly exist in the prior art. That quite obviously is not a legally cognizable "clear and particular, [motivation to combine] supported by actual evidence,"<sup>1</sup> that the Federal Circuit has held is critically important in "less technologically complex inventions."<sup>2</sup> The rejections, therefore, are inconsistent with a long line of Federal Circuit jurisprudence. (See infra, pp. 26 - 30).

Simply put: there was no motivation to combine Marks and Wood that a person of ordinary skill in the art, who thinks along conventional lines, and does not seek to innovate,<sup>3</sup> would have discerned.

<sup>1</sup> Teleflex, Inc. v. Ficosa N. Am. Corp., 299 F. 3d 1313, 1334 (Fed. Cir. 2002) (emphasis added).

<sup>2</sup> In re Dembiczak, 175 F.3d 994, 999 (Fed. Cir. 1999).

<sup>3</sup> Std. Oil v. Am. Cyanamid Co., 774 F. 2d 448, 454 (Fed. Cir. 1985):

The Examiner seems to be under the misimpression that the inherent strategic decisions that are integral to the claimed inventions are irrelevant to the consideration of obviousness. (See Office action pp. 9-10). That conclusion is inconsistent with the Federal Circuit's decisions in a number of cases in particular Moleculon Research Corp. v. CBS, Inc., 793 F.2d 1261 (Fed. Cir. 1986) (which involved a patent to the "Rubik's cube" puzzle; see infra, pp. 21 - 24).

The Examiner improperly rejected claim 26 under 35 U.S.C § 112, ¶ 1, asserting that the specification did not disclose anything but exchanging cards from the opposite sides of the figure. That rejection is wrong as matter of law, as explained below (infra, pp. 33 - 34), and as a matter of fact. The specification describes in three place exchanging cards -- not limited to opposite side -- and Figure 7 shows two card exchanges that are not from opposite sides of the figure. (Infra, pp. 33 - 34).

After almost 3 1/2 years of examination, and three previous office actions, the Examiner first time (in a Final Office Action) made a rejection under 37 C.F.R. § 1.83 (a) stating that a flow chart was necessary.<sup>4</sup> He also reminded Applicant that "[n]o new matter should be entered." That rejection is doubly improper because 37 C.F.R. § 1.81 states that drawings are only required "where necessary for the understanding of the subject matter sought to be patented." (Emphasis added). Applicant submits the subject matter is perfectly understandable without additional flowcharts. Indeed, the Examiner

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"A person of ordinary skill in the art is also presumed to be one who thinks along the line of conventional wisdom in the art and is not one who undertakes to innovate, whether by patient, and often expensive, systematic research or by extraordinary insights, it makes no difference which."

<sup>4</sup> That rejection was made for the first time in a Final Rejection, was not necessitated by any amendment, and therefore was improper. See MPEP § 706.07(a) citing CFR § 1.97(c).

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

argues the inventions were so easy to understand that they would have been obvious to a person of ordinary skill in the art. They are not; but if the inventions would have allegedly been obvious "the subject matter sought to be patented" is certainly understandable without a flow chart.

B. The Inventions At Issue

The Examiner has oversimplified the creative contribution of Applicant's games, which like virtually all video poker games are based on a standard 52-card deck with 13 ranks, four suits (jokers, of course could be added), and has used an impermissible piecemeal approach to reach his conclusion.

Using the Examiner's faulty hindsight and element-by-element reconstruction, it would be all but impossible to obtain patents on novel card games that use a standard playing-card deck, regardless of the considerable innovation and changed strategy inherent in the new games.

1. Background

Casinos have experienced a great deal of interest in multihand video poker games, especially a highly successful game by Moody (covered by U.S. Patent No. 5,823,873). Players seem to think they have a better chance of winning when they play several hands simultaneously, and casinos capitalize on the increased volume of wagering (i.e., a player who plays four hands simultaneously will generally bet four times as much money compared to a player playing a single hand of video poker). However, casinos require games to be played quickly, in approximately 5 - 6 seconds, otherwise the games are not commercially viable. (See Celona Dec. ¶ 9).

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

The key seems to be to design a game that does not appear too complex to potential players (otherwise they will simply walk away), yet that has sufficient "hold" to a casino (i.e., the amount of money the casino keeps as a percentage of the amount bet), and that is fun to play and play quickly.

"Win frequency," the number of times a player wins over the course of time, is also an important parameter. A player must win each game and get some positive reinforcement, otherwise he will stop playing. For example, a player who plays four hands simultaneously (as in Applicant's games), and has only one winning hand, (but three losers), still gets the positive reinforcement, and is more likely to continue playing.

With this as a backdrop, Applicant has invented unconventional<sup>5</sup> looking multihand poker games (see e.g. claims 1- 16, 23 and 26) that appear easy to play because they use a standard deck; the player sees many cards face up which tells him what winning hands he has immediately, and the games do not require any time consuming "draw" (additional cards) to be dealt. For more skilled players, seeing 12 or more of 52 cards face up, for example, allows them to estimate the probable value of cards that are not shown (i.e., the face down corner cards; e.g., claims 2, 10, and 17), and improves their strategic decisions.

Because several hands are played simultaneously (Figures 1 - 5 shows four hands), all cards are dealt at once, and no cards are dealt subsequently, the game plays rather quickly (far faster than the failed Marks game). Although Applicant's game does not play as fast as a single hand of video poker (i.e, in 5-6 seconds), the four-hand

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<sup>5</sup> U.S. Patent No. 6,443,456 to Gajor, a prior art reference the Examiner had previously relied on: "The cards are dealt in a traditional horizontal fashion ..." Col. 2, lines 35-37).

version does not take four times as long. This means the games are sufficiently fast to be attractive to casinos.

2. The Failed Prior Art Marks Game

Applicant has submitted the Declaration of Mr. Tony Celona, an expert in the gaming industry with 24 years of experience who is currently Vice President of Video Gaming Operations and Marketing at Yonkers Raceway, and responsible for installing 5,500 video gaming terminals at that location. (Celona Dec. ¶¶ 1 and 5). Before that Mr. Celona was Vice President, Slot Operations for Foxwoods Casino. (Celona Dec. ¶ 3). At Foxwoods, Mr. Celona was responsible for over 7,000 video slot machines. (Celona Dec. ¶ 3). Prior to Foxwoods he was Vice President of Slot Operations at Trump Taj Mahal Casino in Atlantic City and was responsible for 3,800 slot games. (Celona Dec. ¶ 4).

Mr. Celona is also a patentee in the gaming field (U.S. Patent No. 5,564,700).

In addition to being an expert in the field of gaming, Mr. Celona has personal knowledge of the shortcomings of the prior art Marks game. Mr. Celona played and installed in a casino a game which was called "Big E" that was based on Marks' disclosure in the 5,882,260 patent (a primary reference the Examiner relied on). (Celona Dec. ¶ 8).

Despite Mr. Celona's well-established and extremely relevant credentials, the Examiner improperly brushed aside his testimony with a terse one-sentence statement that is inconsistent with the prevailing law:

"The mere opinion of the [sic] Mr. Celona's commercial knowledge, business experience and success in games does not provide grounds in the determination of non-obviousness." (Page 8).

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

10

The MPEP, the Federal Circuit and the Supreme Court disagree.

MPEP sections 2141 and 716.01, which rely on a series of Federal Circuit cases states "Objective Evidence Must Be Considered."

Section 716 states: "Affidavits or declarations when timely presented containing evidence of ... failure of others ... must be considered by the examiner in determining the issue of obviousness of the claims for patentability ..."

The Federal Circuit, citing the Supreme Court in Graham v. John Deere, 383 U.S. 1, 35-36 (1966), requires evaluation of "highly probative" secondary considerations:

"In Graham the Supreme Court explained that the public and commercial response to an invention is a factor to be considered in determining obviousness, and is entitled to fair weight. The so-called 'secondary considerations' provide evidence of how the patented device is viewed by the interested public: not the inventor, but persons concerned with the product in the objective arena of the marketplace. In this case the considerations of commercial success, licensing activity, and copying were markedly prevalent, and were not disputed. Such aspects may be highly probative of the issue of nonobviousness. ...

Indeed, evidence of secondary considerations may often be the most probative and cogent evidence in the record. It may often establish that an invention appearing to have been obvious in light of the prior art was not. It is to be considered as part of all the evidence, not just when the decisionmaker remains in doubt after reviewing the art."

Citations omitted; emphasis added.

Despite these unvarying admonitions, the Examiner ignored Mr. Celona's testimony that, among other things, the Marks game was an abject failure (Celona Dec. ¶ 8) -- i.e., unmistakable evidence of failure of others.

Indeed, the Examiner reached a completely unsupported conclusion -- directly contradicted by Mr. Celona:

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

11

"Applicant has not disclosed that the different laid out card configuration as recited in claims 1, 5, 8-10 and 17 provides an advantage or solves a stated problem." (Page 6, ¶ 8).

That statement is wrong. Mr. Celona testified that the claimed inventions solved a serious problem in Marks -- Marks was so slow and unworkable that made it a failure. Thus, the Examiner's decision to ignore Mr. Celona's testimony, and to reach a conclusion directly at odds with it, was a legal and factual error.

Additionally, the "problem solving" requirement must be viewed in context. This is a game. Games are built for enjoyment and possibly competition. "Problem solving" is not a high priority in any game, including the cited prior art, or the Rubik's Cube (see e.g., Moleculon). Cf. Moleculon at 1268 ("What we or our predecessors may have said in discussing different fact situations is not to be taken as having universal application.").

These prior art card games, and the invention at issue, are all incremental improvements, governed by the laws of probability and statistics associated with random distribution of playing cards. In this circumstance, the Federal Circuit insists on the "rigorous application" of the requirement to show a motivation to combine which is particularly important in "less technologically complex inventions." (Infra, p. 26).

One of the embodiment shown in the Marks patent was to have a hand pattern in the shape of a the capital letter "E." (See Figure 5 from Marks below):

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

12

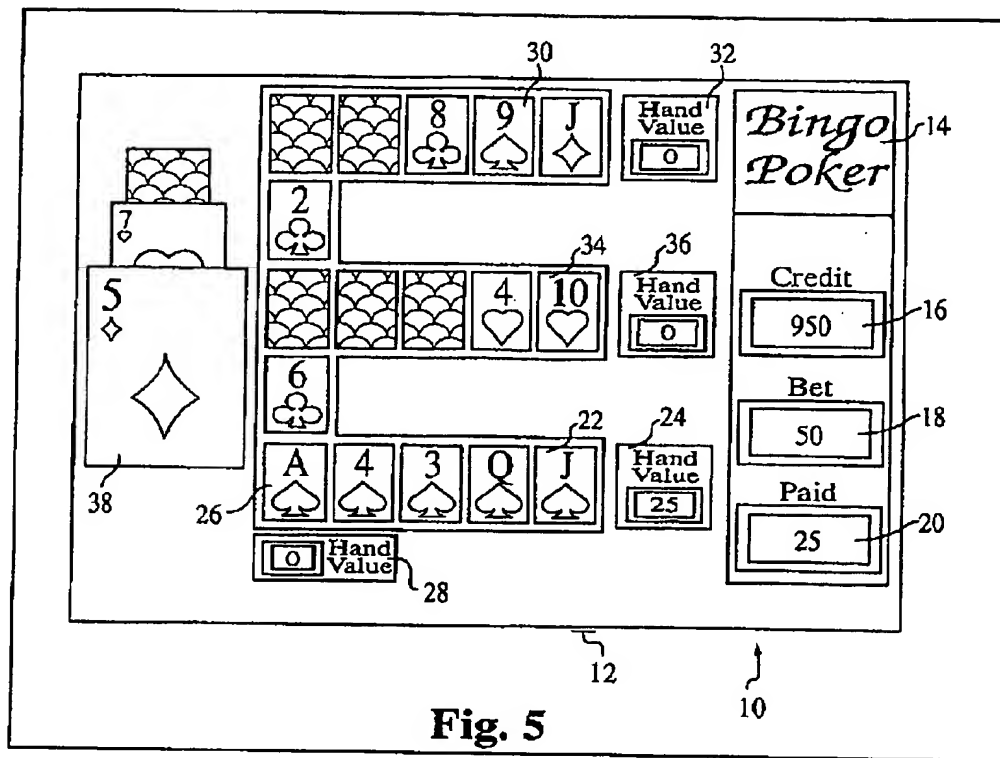
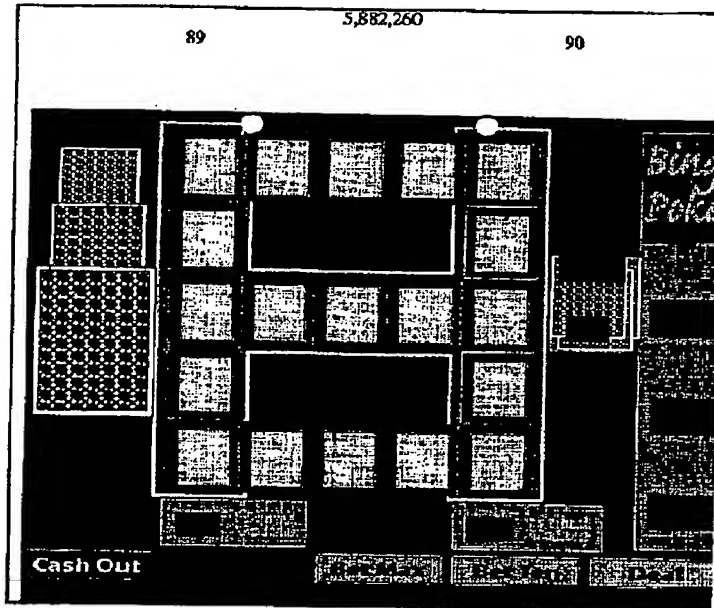


Fig. 5

The disclosure of Marks' patent, which is consistent in all his games, requires players to fill in a "hand pattern" one card at a time. (See col. 3, line 65 - col. 4, line 5; col. 6, lines 5 - 10, 27 - 31 and 53 - col. 7, line 6; col. 7, lines 39 - 41; see also col. 8, lines 33 - col. 9, line 19 and Figures 15 - 27). This is the fundamental teaching of Marks -- and is a significant defect in the prior art that cannot be, but that the Examiner nevertheless, ignored. (See legal discussion *infra*, pp. 24 - 26).

For each of the 19 cards dealt in Marks' Hand Pattern shown in columns 89 and 90 (reproduced below), which the Examiner relied on, the player must consider which of the remaining spaces he will assign that card to maximize the expected value of the resulting hands. But, unlike Applicant's invention, he only knowing the values of previously dealt cards.

Serial No. 10/015,314  
Express Mail No. ER 845145435 US



The Board will quickly see one of the problems of Marks' game: the game is too slow to be commercially viable because the player must evaluate 19 cards one at a time, and decide in which of the spaces (starting with 19 empty spaces comprising five separate hands) to deposit the card. If each consideration takes the player 5 seconds, the game will take 95 seconds. Even half that time is too much. (Celona Dec. ¶ 9). Therefore, Marks' games, which would take over a minute and a half to play, was too slow for casinos, and, for this reason, has not been successful. (Celona ¶¶ 8 - 9).

The defect in the Examiner's consideration of Marks was simply to view a single Hand Pattern of Marks' 150-column patent, but to ignore the tedious and unworkable one-at-a-time card evaluation needed to fill in a Hand Pattern -- significant and uniform teaching away. As the Federal Circuit has held repeatedly, the entire prior

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

art reference must be considered as whole for its teaching to a person of ordinary skill in the art. (*Infra*, pp. 24 - 2626). Any other analysis is inconsistent with the law on obviousness.

It bears emphasis that Marks' Hand Pattern the Examiner relied on is never dealt automatically in that format. Rather, the cards are dealt one at a time, with the player determining the location of each card, until the entire pattern is complete. (Marks col. 4, lines 1-5; see also *Celona* Dec. ¶ 8).

As the Examiner recognized, Marks did not disclose exchanging cards. (See ¶ 8). Indeed, it is virtually impossible to envision, when or how a player would perform card exchanges while selecting cards one-at-a-time to fill in the card hand pattern as required in Marks. Exchanging cards is simply incompatible with Marks' disclosure.

Presumably, one could perform the exchanges after the Hand Pattern was filled in, but that would make the game slower, and would make a bad game worse. There can be no motivation to combine prior art references to make a worse game.

"If proposed modification would render the prior art unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification." (MPEP 2143.01), citing *In re Gordon*, 733 F.2d 900 (Fed. Cir. 1984).

In *Tec Air Inc. v. Denso Mfg Mich. Inc.*, 192 F.3d 1353, 1360 (Fed. Cir. 1999), the Federal Circuit made it plain that references cannot be arbitrarily combined:

"There is no suggestion to combine, however, if a reference teaches away from its combination with another source. 'A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant or if it suggests that the line of development flowing from the reference's disclosure is unlikely to be productive of the result sought by the applicant.' If when combined, the references 'would

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

15

produce a seemingly inoperative device,' then they teach away from their combination."

Citations omitted; emphasis added.

As Mr. Celona testified (Celona Dec. ¶ 16), and as a matter of straightforward analysis of the prior art, adding card exchanges to Marks is unlikely to be productive and would yield an inoperative device. Therefore, there is no legally cognizable motivation to combine.

3. Wood Does Not Overcome the Shortcomings in Marks

The Examiner relied on the Wood patent to show a game that included exchanging cards. Wood shows a two handed poker game -- without common cards -- that permits the player to exchange cards -- but only in certain limited circumstances. The problem with relying on Wood is that the Examiner, again, did not rely on the teaching as a unified whole.

In Wood the player must have a "qualifying hand," which Wood explains could be a pair of 7's or better (col. 2, lines 43-46), before the exchange feature is available. Applicant's invention does not require a threshold hand before a player can exchange cards. Wood is more like a bonus game. In Wood, the player must have a winning hand before the exchange feature is available. In Applicant's invention, exchanging is always available, regardless of hand values.

The Examiner's response to Applicant's explanation of this critical defect in the prior art was "the preamble [of Wood's claim] has the word comprising. Since the word comprising is open-ended language the claim does not preclude from having a qualifier or not [sic]." Here, the Examiner is confusing the unambiguous teaching of the

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

16

prior art with the prior art patent's claim structure. Applicant knows of no legal authority that supports the view that a claim's common terminology (i.e., use of "comprising") somehow trumps the specification's single and distinct disclosure. If this were the law, and it is not, a prior art patent could mean almost anything because of the frequent use of the term "comprising" in claim language (in patents of all types) would make all disclosures "open-ended".

The Examiner also ignored Wood's lack of any guidance or suggestion to combine its layout with Marks. (Celona Dec. ¶ 13). Furthermore, neither Wood nor Marks includes revealing the identity of some of the cards at the end of play as in Applicant's claims 2 and 18. In those games, the corner cards are not revealed until after the card exchanges, making the complexion of the game entirely different from the prior art. That is, exchanges in Applicant's games are made with imperfect knowledge. In Wood, all 10 cards are visible (i.e., perfect knowledge).

Wood does not add anything to the omissions in Marks. Wood does not address the complex strategies and decisions the player faces in Applicant's inventions.

In Wood there are no common cards. And, there is no teaching in Wood that would allow a person skilled in the art to add common cards to the two separate five-card hand arrangements. (Celona Dec. ¶ 15). It is altogether unclear, without resorting to impermissible hindsight, how -- or why -- one of ordinary skill in the art would modify Wood to have common cards. See e.g., (Celona Dec. ¶ 17).

As Mr. Celona testified, a person of ordinary skill in the art would not have thought to combine the Wood game with Marks. (Celona Dec. ¶ 14). There is no contrary evidence.

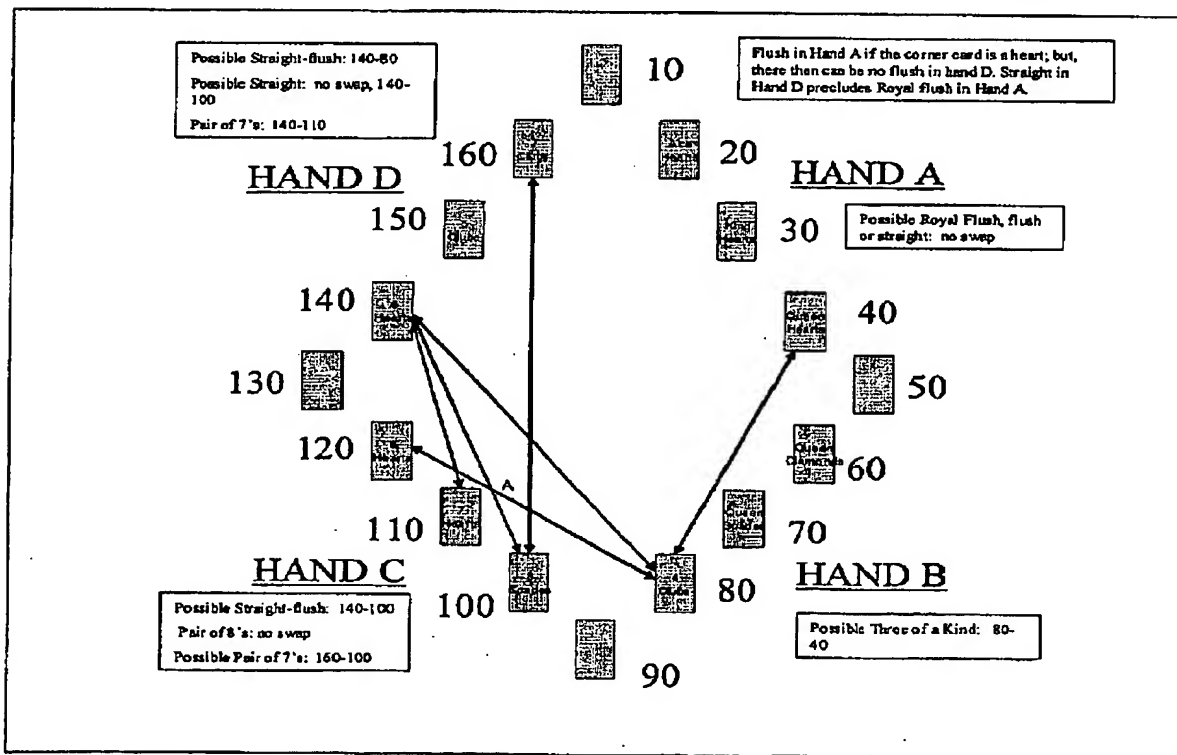
Serial No. 10/015,314  
Express Mail No. ER 845145435 US

17

4. Applicant's Invention

Applicant's novel approach adds an entirely new strategies to video poker games because common cards link the player's hands, and swapping cards can improve one hand while simultaneously making another hand worse. No other card game has these unique properties, and nothing in the prior art would have suggested these innovations to a person of ordinary skill in the art. (Celona Dec. ¶ 14).

An illustration of Applicant's game follows: if the player were dealt the hands as shown below, he would be required to consider entirely new analytic strategies, to solve problems that did not exist in any prior art game, and thus would be playing a game that never existed before; nor were there any suggestions to create such a game.



Serial No. 10/015,314  
Express Mail No. ER 845145435 US

18

In this game, the player must address complex, multi-variant decisions. Hand A has several potential high paying hands: royal flush, straight flush, straight and flush. However, if the player exchanges the Queen from Hand A (card 40) with the 4 from Hand B (card 80), he will have a sure three of a kind in Hand B (three queens), but he will forego the potential very high payout from the royal flush, etc. in Hand A. For one possible payable, used in video poker games, the player must decide if he prefers his chance of getting an 800 to 1 payout on the royal flush and leave the cards the way they are, or if he should exchange cards and forego the sure three of a kind payout of 3 to 1 (but keep the 2 to 1 payout for the pair of Queens in Hand B).

Hand D has several possible straights (3, 4, 5, 6, 7; 4, 5, 6, 7, 8; or 5, 6, 7, 8, 9). But, because two 8's and a 4 have already been dealt (cards 100 and 120 and 80) the probability of completing a straight (i.e., 4, 5, 6, 7, 8) is diminished. Thus, the player must decide whether to swap card 100 (8 of spades) for card 140 (6 of hearts), making the straight in Hand D difficult, but making possible for a flush in Hand C (all Hearts). Alternatively, the player could swap cards 140 and 110, giving him a pair of 7's in Hand D and a pair of 8's in Hand C. With two pairs his odds of getting a paying three of a kind, or possibly a full house are increased, but are they greater than the expected pay off of the previous strategy? These are only a few of the potential card exchanges.

Applicant hopes to be able to show the Board a simulation of the games on a laptop computer at the oral hearing to better enable it to understand the complexities of the games and the differences from the prior art.

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

19

C. The Applicant's Inventions Would Not Have Been Obvious  
To A Person Of Ordinary Skill In The Art

1. The Applicant's Invention Must Be  
Considered As A WHOLE

The law is well settled, inventions must be considered in their entirety; that is, they cannot be dissected into their constituent parts and then matched piece-by-piece with the prior art:

"Focusing on the obviousness of substitutions and differences instead of on the invention as a whole, as the district court did in frequently describing the claimed invention as the mere substitution of monoclonal for polyclonal antibodies in a sandwich assay, was a legally improper way to simplify the difficult determination of obviousness."

Hybritech Inc. v. Monoclonal Antibodies, Inc., 802 F. 2d 1367, 1383 (Fed. Cir. 1986).

Unfortunately, this is what the Examiner did here. He looked for a hand pattern that resembled Applicant's, and found card exchanges in Wood. But, he ignored the teaching of Marks, Wood and Mr. Celona's testimony.

The rock-solid rule is that the claimed invention as a whole must be compared to the prior art. As the Federal Circuit held in Ruiz v. A.B. Chance Co., 234 F.3d 654, 665 (Fed. Cir. 2000) (emphasis added):

"The 'as a whole' instruction in title 35 prevents evaluation of the invention part by part. Without this important requirement, an obviousness assessment might break an invention into its component parts (A + B + C), then find a prior art reference containing A, another containing B, and another containing C, and on that basis alone declare the invention obvious. This form of hindsight reasoning, using the invention as a roadmap to find its prior art components, would discount the value of combining various existing features or principles in a new way to achieve a new result - often the very definition of invention."

Accord, Abbott Laboratories v. Syntrol Bioresearch, Inc., 334 F. 3d 1343, 1357 (Fed. Cir. 2003) ("Knowledge in the prior art of every element of a patent claim, however, is not of itself sufficient to render claim [sic] obvious."); see also, In re Mills, 916 F.2d 680,

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

20

682 (Fed. Cir. 1990). (“[t]he mere fact that the prior art could be so modified would not have made the modification obvious unless the prior art suggests the desirability of the modification.” Citing Gordon at 902)).

The Examiner did precisely what the Federal Circuit has held, repeatedly, was error. He dissected each claim, found a certain claim element in the prior art (or so he contends), then moved on to the next claim element seriatim, and ultimately concluded the inventions were obvious. That is legal error.

More importantly, the Examiner ignored the MPEP, relying on CCPA precedent, that required him to consider inherent properties of the claimed invention, like the complex, novel strategies used in Applicant’s inventions:

“In delineating the invention as a whole, we look not only to the subject matter which is literally recited in the claim in question ... but also to those properties of the subject matter which are inherent in the subject matter and are disclosed in the specification. . . it is this invention as a whole, and not some part of it, which must be obvious under 35 U.S.C. 103.”

In re Antonie, 559 F.2d 618, 619 (C.C.P.A. 1977); accord MPEP § 2141.02 (underline added).

Very recently, the Federal Circuit held reading claims in light of the specification required the claims to include inherent characteristics.

“We do not think that to construe the ‘floatation units’ as hollow is importing a limitation into the claims when the specification makes clear that hollowness is an inherent characteristic of the ‘floatation units’ in the claimed invention.”

Ocean Innovations, Inc. v. Jet Dock Systems, Inc., 2005 U.S. App. LEXIS 17775 (Fed. Cir. August 19, 2005).

Without considering the inherent, but significant differences between the claimed inventions and the prior art, the Examiner’s conclusion is unsupportable.

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

21

Although the cards themselves are old, the different strategic decisions required to play Applicant's inventions (which for the most part is what all new poker game and card-game patents are about) are entirely new. These "properties of the subject matter which are inherent ... *and* are disclosed in the specification" are, because of the combination of an innovative layout and card exchanges, entirely novel and require new strategies and player decisions that have never been disclosed before.

Although a player's strategies and thought processes cannot be patented, the games that permit (or require) these strategies can be; these strategies are intrinsically interwoven in the claimed inventions are integral to, and an "inherent" part of, Applicant's inventions.

Applicant knows of no way to claim what could be hundreds of thousands (or more) different playing strategies, claims the Examiner appears to insist on.

In Moleculon 793 F.2d 1261, the Federal Circuit sustained the validity of a patent directed to the puzzle commonly called the "Rubik's Cube" over attacks to its validity based on obviousness, similar to those here, and under 35 U.S.C. §§ 112 and 101. In that case, the Federal Circuit affirmed the District Court's claim interpretation that certain features of the puzzle were inherently part of the claimed inventions:

It is plain from the specifications of the '201 patent that the user is to rotate sets of cube pieces about three axes in order to solve the puzzle. Not only are three axes an inherent feature of the 2 x 2 x 2 cube described in the specifications, but there are explicit references to these three axes or the three corresponding coordinate planes in every part of the patent, from the abstract to the drawings. . . .

Claim 3 clearly can be read to contemplate rotation about three axes . . . This seems to be a reasonable interpretation of the words of the claim, and is clearly consonant with the implications of the rest of the patent and the intent of the patentee."

793 F.2d at 1269 (emphasis added).

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

22

The Federal Circuit further held:

[T]he trial court correctly ascertained the true meaning of the claim by interpreting the claim language (e.g., 'a first axis,' 'a second axis') in light of the specification and the patent as a whole."

793 F.2d at 1269 (emphasis added).

Moreover, the infringer in Moleculon also alleged the claims were invalid because they "do not 'teach' anyone the complicated method of solving ... [the] puzzle." (At 1269). Solution of that puzzle is akin to the card exchange strategies incorporated into the claimed inventions here. The Federal Circuit rejected that ground for invalidity because:

"They claim a general *approach* for solving the puzzle. As the district court correctly observed, neither the claims nor the disclosure need set forth *a particular* series of moves to solve the puzzle. Not only do the series of moves for restoring depend on how the preselected pattern was randomized, but there may be more than just one sequence of steps that will restore the preselected pattern. "

793 F.2d at 1269 (emphasis in original).

The Court's holding is instructive because the unclaimed "particular series of moves to solve the puzzle" is the same as the particular strategy the player must use in the claimed inventions to optimize his returns. Both are "randomized" events. When the cards are dealt, they are totally random and all the hundreds of thousands of (and perhaps more) "particular ... moves" to "solve" the multihand card "puzzle" cannot possibility be claimed, but nevertheless make up an intrinsic part of the inventions.

The Examiner's rejection based on his assertion that "features upon which applicant relies (i.e., the game is to [sic] slow to be commercially viable, the cards are not dealt automatically, and different strategy) are not recited in the rejected claim(s).

Although the claims are interpreted in light of the specification, limitations from the

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

23

specification are not read into the claims.” (pages 9-10; emphasis added). The Examiner is right as a general matter that limitations from the specification are not read into the claims -- but he is wrong when he decided not to consider the vast difference between the prior art and the claimed inventions based in part on the inventions’ inherent characteristics, including the fundamentally new strategies.

It is critically important to recognize that the arrangement of the cards in Applicant’s inventions is not the only new feature of the games, nor is the card arrangement alone, the only new feature in any of the prior art. To the extent the Examiner argues that the card arrangement alone is not patentable, that is not the appropriate test to determine patentability.

2. The Prior Art As A Whole Must Be Considered

Not only must the claimed invention be considered as a whole, but each prior art reference must also be considered in its entirety. W.L. Gore & Assoc., Inc. v. Garlock, inc., 721 F.2d 1540, 1550 (Fed. Cir. 1983); see also Gordon at 902.

Therefore it is imperative that: “A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention.” MPEP 2141.02 (first emphasis in original); Gore at 1550; see also Gordon at 902.

With these rules in mind, it is important to consider the slow-playing one-card-at-a-time game Marks has disclosed -- the entire game -- not just one of many ways his cards are displayed.

As explained above, at the beginning of Marks’ game the player sees only the first card dealt. At the same stage in Applicant’s four-sided game (e.g. claims 1 and

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

24

dependent claims, 23 and 26 -27 ) the player knows the identity of 12 to 16 cards (he knows all 16 cards if the corner cards are dealt face up in the four-hand version of the game (see claims 3; over a quarter of the deck); seeing all 12 face-up cards immediately gives the player some insight into the face-down corner cards, not available, and not suggested, in any prior art game.

By comparison, it is not until towards the end of Marks' game, after 12 cards are dealt one at a time (perhaps over a minute later), that the player knows the identity of 12 cards, information the player has at the beginning of Applicant's games.

The result is that Applicant's invention plays faster than Marks' game and provides critically useful information to the player to help him make informed decisions about what strategy to follow. (Celona Dec. ¶ 11). This is undisputed.

Compared to Wood, the strategy in Applicant's invention is entirely different because in Wood all ten cards are visible and the player can exchange cards only between two hands. By contrast, in Applicant's invention, of claims 2 and 10 for example, only three of the five-card hands are visible, and there are four interconnected hands displayed. The games of these claims are far more difficult than Wood because the player does not have all the information about each of the five cards in the hand. Additionally, the swapping strategy in Wood is much simpler. In Wood there are only one choice; swapping from hand 1 to hand 2.

Neither prior art patent suggests any way to combine the two disclosures to make a playable game. Any combination of the two would require extensive reconstruction which must be based purely on hindsight teaching from Applicant's disclosure, and would yield a useless result. (Celona Dec. ¶¶ 14 to 18).

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

25

As the MPEP make plain, this hypothetical combination cannot be done, and would never have been done by a person of ordinary skill in the art:

"If proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification.

"If the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims *prima facie* obvious." (MPEP 2143.01 and .02); see Gordon, 733 F.3d 900.

The Examiner's proposed modification of Marks, using Wood, runs afoul of these two rules. First, the modification would make the resulting game "unsatisfactory for its intended purpose." Second, the proposed modification entirely "change[s] the principle" of Marks. Allowing exchanges after the player makes an initial set of decisions as to card locations, renders that initial set of decisions moot or irrelevant – the decision set is a key principle of Marks. This combination, therefore cannot be done, and would not have been done by the person of ordinary skill in the art. (Celona Dec. ¶¶ 14-19).

Finally, Marks could never be used in any sensible configuration to have card exchanges. (Celona Dec. ¶ 16). In Marks, when would the swapping take place? After each card is dealt? After all 19 cards are dealt? If somehow Marks and Wood were combined, using Marks' Hand Patterns and Woods swapping, the game would be too slow to have any commercial applicability. (Celona Dec. ¶ 16).

### 3. There Was No Motivation to Combine

The law is too well established to admit dispute: there would not have been a combination of the prior art unless there was an unambiguous motivation or a teaching to combine the particular references at issue.

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

26

In In re Dembiczak, 175 F.3d 994, 999 (Fed. Cir. 1999), the Federal Circuit emphasized this critically important rule as applied to "less technologically complex inventions" (in Dembiczak, the invention was for Halloween face design put on plastic garbage bags):

"Measuring a claimed invention against the standard established by section 103 requires the oft-difficult but critical step of casting the mind back to the time of invention, to consider the thinking of one of ordinary skill in the art, guided only by the prior art references and the then-accepted wisdom in the field. Close adherence to this methodology is especially important in the case of less technologically complex inventions, where the very ease with which the invention can be understood may prompt one 'to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher.'

Our case law makes clear that the best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references."

(citations omitted; emphasis added); accord, Teleflex, Inc. v. Ficosa N. Am. Corp., 299 F.3d 1313, 1334 (Fed. Cir. 2002) ("The showing of a motivation to combine must be clear and particular, and it must be supported by actual evidence." A conclusory assertion that the nature of the problem supplies the necessary motivation to combine is not a clear and particular showing. (Citation omitted; emphasis added)); Crown Operations Int'l v. Krone, 289 F.3d 1367, 1376 (Fed. Cir. 2002) ("Determination of obviousness cannot be based on the hindsight combination of components selectively culled from the prior art to fit the parameters of the patented invention." (Citations omitted)).

In W.L. Gore Associates, Inc. v. Garlock, 721 F.2d 1540, 1551 (Fed. Cir. 1983), the Federal Circuit made it crystal clear that hindsight analysis must be prevented:

"To imbue one of ordinary skill in the art with knowledge of the invention in suit, when no prior art reference or references of record convey or suggest that knowledge, is to fall victim to the insidious effect of a hindsight syndrome wherein that which only the inventor taught is used against its teacher.

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

27

It is difficult but necessary that the decision maker forget what he or she has been taught at trial about the claimed invention and cast the mind back to the time the invention was made (often as here many years), to occupy the mind of one skilled in the art who is presented only with the references, and who is normally guided by the then-accepted wisdom in the art."

Although cards, and games that laid them out in many different patterns and card exchanging were known, that fact would not have made the claimed inventions obvious to a person of ordinary skill in the art. Time and time again, the Federal Circuit has held that an assemblage of "old parts" is not in and of itself unpatentable. Ruiz, supra, 234 F. 3d at 665 (footnotes and citations omitted; emphasis added):

"Because there is 'a general rule that combination claims can consist of combinations of old elements as well as new elements,' 'the notion that combination claims can be declared invalid merely upon finding similar elements in separate prior patents would necessarily destroy virtually all patents and cannot be the law under the statute, § 103.' It is insufficient to establish obviousness that the separate elements of the invention existed in the prior art, absent some teaching or suggestion, in the prior art, to combine the elements."

Arkie Lures Inc. v. Tackle, Inc., 119 F.3d 953, 957 (Fed. Cir. 1997)(same); In re Dembiczak, supra.

The Examiner has not pointed to any motivation to combine these dissimilar references. The closest the Examiner has come to identifying a motivation to combine is: that exchanging cards "would provide game players a chance to modify their poker had [sic] to increase their chances for a better reward." (Final Office Action Page 5). This generalized statement, however, is not a motivation to combine the two references, Marks and Wood, the Examiner has cited. There are an infinite number of ways to modify card games "to increase [the player's] chances for better rewards." The pay table could be improved; the number of cards in the deck could be reduced, bonus wheels, and bonus cards could be used; jokers and wild cards could be added; incentives

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

28

could be given based on the time of day or the day of the week, etc.: this simplistic generalization is not a clear or particular motivation to combine Wood and Marks, or any of the other references. It is hindsight analysis plain and simple.

It is equally, critically important to keep firmly in mind that "the person of ordinary skill in the art is an objective legal construct presumed to think along conventional lines without undertaking to innovate, whether by systematic research or by extraordinary insights." Life Technologies, Inc. v. Clontech Laboratories, Inc., 224 F.3d 1320, 1325 (Fed. Cir. 2000); Std. Oil Co. v. Am. Cyanamid Co., 774 F.2d 448, 454 (Fed. Cir. 1985) ("A person of ordinary skill in the art is also presumed to be one who thinks along the line of conventional wisdom in the art and is not one who undertakes to innovate, whether by patient, and often expensive, systematic research or by extraordinary insights, it makes no difference which." (Emphasis added)). This person does not look for creative solutions, and does not consider how to completely redesign existing games to arrive at novel, challenging ones that have heretofore been unknown.

Mr. Celona testified that in his opinion, a person of ordinary skill in the art would not have been motivated to combine these references. (See Celona Dec. ¶¶ 13, 14 and 17). But, the Examiner ignored that well supported conclusion, and used the Applicant's disclosure as a blueprint for cobbling together the prior art.

The Federal Circuit's immutable rules, however, are intended to prevent the Examiner from falling into an improper hindsight analysis: that is, where the Examiner uses teaching and information in the pending application as a guide to assemble disparate prior art references. As the Federal Circuit has explained in In re Fritch 972 F.2d 1260, 1266 (1992):

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

29

"[I]t is impermissible to use the claimed invention as an instruction manual or 'template' to piece together the teachings of the prior art so that the claimed invention is rendered obvious. ... This court has previously stated that '[o]ne cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention.'" (Footnotes omitted).

4. Even if Combined, The References Do Not Result in The Claimed Inventions

Even if there were a motivation to combine, and there is none, the Examiner's obviousness conclusion is inconsistent with the prevailing law as enunciated in the MPEP.

"To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art." MPEP § 2143.03 (emphasis added). Citing In re Royka, 490 F.2d 981 (CCPA 1974)).

For example, the following limitation of claim 1 would not be present in the combination of Wood and Marks, for the reasons stated above:

"dealing cards [altogether at the outset] in a four sided, diamond shape, each side is a separate hand that has five cards, consisting of three interior cards and two corner cards, the corner cards are shared with two adjacent hands."

\* \* \*

These rules of law demonstrate Applicant's invention would not have been obvious to a person of ordinary skill in the art for at least three key reasons: (1) the differences between the references when considered as integrated wholes and the claimed inventions when considered as a whole are considerable; (2) there was absolutely no motivation to combine the references; and (3) even if these references were combined, they would not yield Applicant's invention. (Celona Dec. ¶¶ 14-19).

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

30

5. The Other Cited References Do Not Render  
Obvious The Claimed Inventions

The Examiner applied other references to dependent claims. The law is well established, if an independent claim would not have been obvious (as is the case here), dependent claims from which it depends would not have been obvious. In re Fine, 837 F.2d 1071 (Fed. Cir. 1988).

For completeness however, Applicant explains the following errors in the Examiner's conclusion.

The Examiner cited Garrod for the proposition that wild cards are well known. (See discussion about claims 7 and 11, page 6). Applicant has made no claim that he invented wild cards. It is true they were well known. However, using wild cards in the novel games Applicant has claimed is a unique adaptation of these cards. Again, the claimed inventions in their entirety must be compared to the prior art, not as the Examiner has done by considering each claim element separately.

Garrod does not disclose exchanging cards, common cards or multiple hands as in Applicant's invention. Because Garrod is basically a series of single hand games, the strategy is entirely different from Applicant's. There is no suggestion in Garrod about how it could be modified to have exchanging, and there is no motivation to combine Garrod with Marks or Wood.

As explained above, the broad unfocused "motivation" to combine (to increase a player's chance for a better reward) could have lead a person to combine Garrod and Marks -- and nothing else. The Examiner has not, and cannot explain, why a

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

31

person of ordinary skill would have combined Wood with Marks instead of Marks and Garrod.

Wächtler discloses "buying New cards" (col. 1 lines 5 – 10). Buying new cards is entirely different from paying for the right to swap existing cards. Buying new cards replaces existing cards with the expectation that the unknown new cards will be better. In the extreme case, the player can get an entirely new hand. By contrast, exchanging cards, as explained above, requires the player to redistribute existing cards. The difference is fundamental: one attempts to improve a hand by acquisition (i.e., entirely new unseen cards) versus by rearrangement (i.e., known cards with serious inter-relationship issues, as explained above). Furthermore, exchanging may improve one hand while making another hand worse. There is no comparable result with replacement. Wächtler's replacement only affects a single hand and is, therefore, not comparable to an exchange. Thus, Wächtler includes an uncertain outcome from his purchase versus a known outcome in Applicant's, and each purchase affects only one hand versus Applicant's two. Wächler does not address these issues, and he does not have common cards.

It is altogether unclear why a person of ordinary skill would combine Wood's card exchanges with the addition of buying new cards. The resulting combination would be either redundant or pointless. It would be completely inconsistent with the objective of card exchanges.

D. The Claims Are NOT Limited To Swapping From  
Opposite Sides Of The Figure

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

32

The Abstract states that the patent relates to "an innovative multi-hand poker game where cards are arranged as a polygon." Polygons, obviously include figures (like pentagons) that generally have no opposite side. The Abstract further explains:

- "The player can exchange cards from one hand with cards in another hand to improve his odds of winning."

This statement does not suggest limiting card exchanges to the hand from the opposite side of a figure.

Indeed, Figure 7 shows a pentagon shows two sets of card exchanges that are not from opposite sides of the figure. The Examiner has ignored that plain depiction.

The specification states that cards can be exchanged freely:

- "As described in more detail below, this game allows a player to play multiple games simultaneously and permits him to exchange cards from other hands to improve his odds of winning." (Page 1, ¶ 2; emphasis added); and

- "There are a number of video poker games involving multiple hands ... but none of these games allows the payer to exchange cards from one hand to another hand." (Page 1, ¶ 4).

None of these descriptions limit card exchanges to cards from the opposite side of a figure. Moreover, the specification indicates cards can be exchanged without limitation, and in one place expressly states that cards can be exchanged from other hands -- plural. Because a figure can have only one opposite side, this statement means the claims cannot be limited to exchanges from the opposite side.

Although three of seven figures show exchanges from opposite sides, in only one place in the text of the specification does it say: "[t]he player could then decide

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

33

to swap cards from opposite sides of the diamond.” (Page 1, ¶ 2; emphasis added).

Neither this conditional statement nor the figure limits the claims to swapping from opposite sides.

In Phillips v. AWH Corp., Civil Action No 03-1269, - 1286 (Fed. Cir. July 12, 2005), the Federal Circuit recently held, en banc:

“[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments. See, e.g., Nazomi Communications, Inc. v. ARM Holdings, PLC, 403 F.3d 1364, 1369 (Fed. Cir. 2005) (claims may embrace “different subject matter than is illustrated in the specific embodiments in the specification”) (Citations omitted). In particular, we have expressly rejected the contention that if a patent describes only a single embodiment, the claims of the patent must be construed as being limited to that embodiment. (Citations omitted). That is not just because section 112 of the Patent Act requires that the claims themselves set forth the limits of the patent grant, but also because persons of ordinary skill in the art rarely would confine their definitions of terms to the exact representations depicted in the embodiments.”

The Examiner’s section 112, ¶1 rejection is inconsistent with specification’s disclosure -- and wrong as a matter of law.

That rejection must be reversed.

E. Claim 26 Does Not Violate Section 112, Paragraph 2

The Examiner made a conclusory one sentence rejection of claim 26 under section 112, paragraph 2 stating the claim was “indefinite for failing to particularly point out and distinctly claim the subject matter ...” the Examiner provided no explanation about why that was allegedly so.

“The legal standard for definiteness is whether a claim reasonably apprises those of skill in the art of its scope.” In re Warmerdam, 33 F.3d 1354, 1361 (Fed. Cir. 1994), citing Amgen Inc. v. Chugai Pharmaceutical Co. Ltd., 927 F.2d 1200, 1217, 18

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

34

U.S.P.Q.2D (BNA) 1016, 1030 (Fed. Cir.), cert. denied sub nom., Genetics Inst., Inc. v. Amgen, Inc., 116 L. Ed. 2d 132, 112 S. Ct. 169 (1991) (citing Shatterproof Glass Corp. v. Libbey-Owens Ford Co., 758 F.2d 613, 624, 225 U.S.P.Q. (BNA) 634, 641 (Fed. Cir. 1985)).”

In Andrew Corp. v. Gabriel Electronics, Inc., 847 F.2d 819, 822 (Fed. Cir. 1988) The Federal Circuit held:

“If the claims, read in the light of the specification, reasonably apprise those skilled in the art both of the utilization and scope of the invention, and if the language is as precise as the subject matter permits, the courts can demand no more.”

Quoting Shatterproof Glass Corp. v. Libbey-Owens Ford Co., 758 F.2d 613, 624, 225 USPQ 634, 641 (Fed. Cir.), cert. dismissed, 474 U.S. 976, 106 S. Ct. 340, 88 L. Ed. 2d 326 (1985); see also Exxon Research and Engineering Co. v. United States, 265 F.3d 1371 (Fed. Cir. 2001); Athletic Alternatives, Inc. v. Prince Mfg. Inc., 73 F.3d 1573, 1581 (Fed. Cir. 1996).

Claim 26 uses similar terminology as the prior claims that were not objected to under section 112, but covers a different embodiment of the claimed inventions. The Examiner has not said, nor could he, that a person of ordinary skill would not understand the claimed invention.

In Amgen, Inc. v. Hoechst Marion Roussel, Inc., 314 F.3d 1313, 1342 (Fed. Cir. 2003), the Federal Circuit held:

“The standard of indefiniteness is somewhat high; a claim is not indefinite merely because its scope is not ascertainable from the face of the claims. Rather, a claim is indefinite under § 112 ¶ 2 if it is ‘insolubly ambiguous, and no narrowing construction can properly be adopted.’” (Citation omitted; emphasis added).

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

35

There is no evidence whatsoever, nor could there be, that claim 26 is  
"insolubly ambiguous."

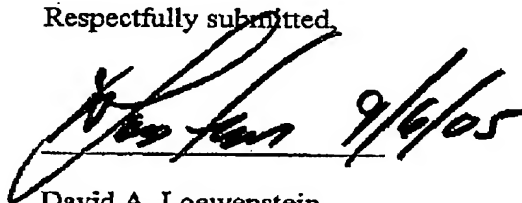
Moreover, the Examiner has not rejected claim 26 over the prior art,  
meaning the claim is sufficiently different from the prior art to avoid any section 112, ¶ 2  
issue. Amgen 927 F.2d at 1217 - 18 (to comply with section 112, ¶ 2, the claim must  
differentiate the prior art).

The indefiniteness rejection under section 112 is wrong as a matter of law.

IX. CONCLUSION

For the foregoing reasons, the Examiner's rejections are wrong as a matter  
of law, and the claims are now in condition for allowance.

Respectfully submitted,



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Serial No. 10/015,314  
Express Mail No. ER 845145435 US

36

APPENDIX

1. A method to play video poker comprising the following steps:  
dealing cards in a four sided, diamond shape, each side is a separate hand that has five cards, consisting of three interior cards and two corner cards, the corner cards are shared with two adjacent hands, a player can exchange cards from one hand to another hand, after all exchanges, each of the resulting hands is compared to a payable.
2. The method to play video poker of claim 1 comprising the following steps: dealing the three interior cards in each hand face up and the corner cards face down; the player is given the opportunity to exchange interior cards; the corner cards are revealed after all exchanges, and each of the resulting hands is ~~are~~ compared to a payable after the corner cards are revealed.
3. The method of claim 1 where the three interior cards are dealt face up and the corner cards are dealt face up.
4. The method of claim 1 where the player can exchange corner cards, but the interior cards are not exchanged.
5. The method of claim 1 where a six-sided shape is used instead of a four-sided shape.
6. The method of claim 1 where an additional card is dealt that can be exchanged with one of the corner cards.
7. The method of claim 1 where an additional card is dealt that is a wild card.
8. The method of claim 1 where an eight-sided shape is used instead of a four-sided shape.

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

37

interior cards are dealt face up and the player can exchange interior cards between hands after all exchanges each of the resulting hands is compared to a payable.

18. The method of claim 17 where the end cards are dealt face down and are revealed after the player has exchanged cards.

19. The method of claim 17 where two pairs of hands are dealt so that each hand has three interior cards and all hands share two common end cards.

23. A method to play a video poker game that comprises the following steps:

- (a) dealing cards in a four sided diamond shape, consisting of 16 cards, where each side is a separate hand that has five cards consisting of three interior cards and two corner cards, the corner cards are shared with two adjacent hands,
- (b) permitting a player to exchange cards from one hand to another hand;
- (c) after the exchanges, comparing each of the resulting hands to a payable; and
- (d) paying the player according to amounts set out in the payable for each hand.

26. A method to play video poker comprising the following steps:  
dealing cards in a four sided, diamond shape, each side is a separate hand that has five cards, consisting of three interior cards and two corner cards, the corner cards are shared with two adjacent hands, a player can exchange cards from one hand to another hand, and

Serial No. 10/015,314  
Express Mail No. ER 845145435 US

39

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